SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1961.

No. 407.

UNITED STATES OF AMERICA ex rel. L. B. BINION,
Petitioner,

v.

UNITED STATES MARSHAL FOR THE DISTRICT OF NEVADA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner's Reply Memorandum.

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PETITIONER'S REPLY MEMORANDUM.

Respondent's Brief in Opposition strays so far from the facts and the issues that a few words by way of reply seem imperatively required.

I. There Is an Actual Conflict Between Two Circuits as to the Amount of Time This Particular Petitioner Is Still Required to Serve Under a Sentence Imposed in 1953.

When petitioner was released on bail pursuant to order of this Court (352 U. S. 1028), he had three months and twenty days remaining to serve on the Texas sentence imposed in December, 1953 (273 F. 2d at 496; Pet. App. 15a). The statement by the Government (Br. Op. 3) that there were three months and twenty-seven days remaining is plainly wrong.

The Third Circuit held (273 F. 2d at 498; Pet. App. 19a) that he was entitled to credit for 50 days by reason of the Probation Officer's restraints in 1957, and that period plus the two days' credit for actual custody in the hands of the Marshal at Philadelphia (273 F. 2d at 497, note 1; Pet. App. 16a, note 1), left Binion with 58 days to serve.

The order of the District Court for Eastern Pennsylvania, *drafted* by the Government (Pet. 12-13), specifically recited that—

> "The time remaining to be served shall be computed in accordance with the opinion of the United States Court of Appeals for the Third Circuit dated December 9, 1959 [i.e., 273 F. 2d 495; Pet. App. 14a-20a]."

Thereafter, the United States District Court for Nevada (R. 11-24; 188 F. Supp. 905) disagreed with the Third Circuit, holding that Binion was not entitled to any credit for the Probation Officer's restraints. The Ninth Circuit then refused to resolve the difference, on the view that Binion was not in either event entitled to immediate release (Pet. App. 7a-8a; 292 F. 2d at 498).

How, in the face of Binion's present contention that this obvious difference in views leaves the Government's custodial officers without authoritative guidance as to his proper release date (Pet. 14-15), respondent can still argue (Br. Op. 8-9) that there is no conflict, or that the Third Circuit did not hold that it had authority to decide the issue of petitioner's remaining time when it *did* decide the issue, is simply beyond comprehension.

That *Harris v. Lang* conflicts with the decision of the court below is acknowledged in that court's reliance on *Patterson v. Jones*, 141 F. 2d 319 (1944), for there the Ninth Circuit expressly disagreed with and refused to follow *Harris v. Lang*.

II. The Controversy Here Touches All Remaining Time to Be Served on Any Computation.

A. Equally incomprehensible is respondent's further assertion (Br. Op. 11):

> "Even assuming that petitioner would be entitled to receive credit as time spent in confinement for this period, the fifty-day credit to which the Court of Appeals for the Third Circuit said petitioner was entitled would have to be deducted from the fifty-eight days claimed here, leaving only eight days' credit, if any, in controversy. As a result, petitioner would not now be entitled to release even if his arguments on this issue are correct."

The foregoing comments completely misapprehend the record. The 50-day period involved in the Third Circuit decision was credit for unlawful restraint imposed between September 3rd and October 23rd, 1957. 273 F. 2d at 497-498. The 58-day period runs from December 22, 1958, to February 19, 1959, over two years later. These two periods have not the slightest connection factually or legally. Yet the Government blandly argues to this Court that if petitioner receives credit for the latter, he must be deprived of credit for the former. Obviously this cannot be true.

B. The Chief Probation Officer, Hubert A. Boyd, made it abundantly clear that the close supervision imposed upon the petitioner in the period from March 19, 1957, to October 23, 1957, was *in addition* to the requirement of probation under his Nevada sentence, and was because of the Texas sentence (R. 65, 75). Thus, although the court suggested to Mr. Boyd that he handle "this case on probation in the same manner as . . . any case here in Nevada" (R. 44), the probation officer did not obey the court's instruction (Pet. 6, 22).

C. The Brief in Opposition asserts for the first time that to give petitioner credit for the 58 days following his

discharge on habeas corpus and the Government's notice of appeal "would clearly contradict Rule 38(a)(2) of the Federal Rules of Criminal Procedure which, pending an appeal, prevents even a prisoner on bail from receiving credit on his sentence" (Br. Op. 10). Surely the Government must know that the Rules of Criminal Procedure do not apply to a habeas corpus proceeding. Furthermore, even under this Rule, after the petitioner was discharged he did not seek to *stay* the sentence of imprisonment; he did not elect not to commence service[1] of the sentence; he was *not* released under bail or even under his own recognizance. He was completely discharged! The appeal was taken by the Government (Pet. 18, 19), under the Federal Rules of Civil Procedure.

There is also no merit to the other assertion by the Government in the same paragraph: "If petitioner's contentions were correct, however, he would receive credit for a period of time when he was neither in prison nor on bail" (Br. Op. 10). This tired, old argument has appeared in almost every Government brief in this litigation. The Government persists in refusing to acknowledge the long line of cases, summarized in the Petition at page 23, where prisoners have received credit for periods of time when they were "neither in prison nor on bail." Perhaps there is no better evidence of the vital necessity for this Court to hear this case than the refusal of the Department of Justice to acknowledge this unbroken line of decisions by the lower federal courts. Plainly this presents a far-reaching problem in the administration of justice.

D. On petitioner's primary assertion that the decision below is in direct conflict with the decisions of four other courts of appeals, the text of the Brief in Opposition is completely silent. Counsel for the Government use the text to imply erroneously that the issue has already been decided

1. "In order to stay the sentence under that rule there must be both an appeal and an election by the appellant not to commence service of his sentence." *Hogue v. United States*, 287 F. 2d 99, 101 (C. A. 5, 1961).

and to make other irrelevant arguments. But on the issue of the conflict among the circuits, the Government puts its argument into a footnote. See footnote 7 on page 9.

The nature of the Government's position makes it rather clear why the Solicitor General relegated it to a footnote. Only one of the cases relied upon by petitioner is discussed. That is *Harris v. Lang*, 27 App. D. C. 84. That court held that a prisoner's sentence continued to run following his discharge on habeas corpus so that, even though the lower court was in error in granting the writ, its decision would not be reversed.

The Government does not deny that the case so held, but rather attempts to make a distinction between *Harris v. Lang* and this case that is patently spurious. "The [District of Columbia] court of appeals held that, even if the lower court had been right on the merits, its release of the prisoner was premature. Here, in contrast, if the District Court for the Eastern District of Pennsylvania had been correct in crediting the probation period, petitioner was entitled to release" (Br. op. 10 n. 7). The first sentence here is sheer nonsense. To say that, even if a court had been right on the merits, its decision was wrong is to deprive the words right and wrong of any meaning. If the lower court in *Harris v. Lang* was right on the merits, its decision must have been right. The court of appeals held that the lower court was wrong on the merits and its decision was wrong.

Once again the Government is guilty of stating a half-truth. There were several issues involved in the merits in *Harris v. Lang*. At one point in the opinion, 27 App. D. C. at 88, the court does indicate that, even if the lower court had been right *on a subsidiary issue on the merits*, discharge of the prisoner was premature. That is, obviously enough, because the lower court was wrong on the merits of the controlling issue. This is all that underlies the trumped-up "in contrast" between this case and *Harris v. Lang*.

The Government's distinction of the decisions of the Second, Ninth and Tenth Circuits is no less specious. Without even a single citation to any of the cases, the Brief in Opposition asserts: "The other decisions on which petitioner relies (Pet. 16-17) involve the erroneous release of prisoners by the government itself. . . . Here, however, petitioner himself sought release by bringing a habeas corpus proceeding. Petitioner should not get the benefit of an erroneous judicial determination caused by his own efforts" (Br. Op. 10, n. 7).

There are several remarkable things about this statement. The most significant, perhaps, is the implicit pronouncement that the judiciary is not a part of the Government. All the cases cited by petitioner are classed as involving "the erroneous release of prisoners by the government itself," whereas, in this case there is only "an erroneous judicial determination." Thus, according to the Brief in Opposition, the judiciary is not part of the Government. Perhaps what the Brief in Opposition means to suggest is that the other cases involved erroneous decisions by members of the executive branch, while here there is an erroneous decision by a member of the judicial branch of the Government. How or why that should make any difference is not explained because the Government did not choose to devote more than one brief footnote passage to the whole issue. Moreover, it has never argued or intimated such a theory in any prior stage of the litigation. Finally, the cases themselves simply do not fall into such categories. *Harris v. Lang, supra*, involved an erroneous judicial decision. So, too, *Smith v. Swope*, 91 F. 2d 260 (C. A. 9, 1937), and *Albori v. United States*, 67 F. 2d 4 (C. A. 9, 1933), do not fit the description of erroneous decisions by a member of the executive branch.

Another truly remarkable innuendo in the footnote is that the petitioner ought not to be heard to complain because he brought this all on himself. "Petitioner should not get the benefit of an erroneous judicial determination

caused by his own efforts," says the Brief in Opposition. This is patently absurd. Petitioner did not cause an erroneous judicial determination. The Government seems to believe that there is something blameworthy in a federal prisoner's seeking to invoke the Great Writ of the Common Law. Such an audacious fellow ought not to be allowed any benefit, urges the Government.

III. "Law and Justice" (28 U. S. C. § 2243) Require Petitioner's Immediate Release.

Petitioner, released more than four and a half years ago (R. 51, 60-61, 78), has been at liberty all of that time, except for 2 days in October 1957 and one day in July 1960. Much of the intervening delay, as has been shown (Pet. 25-26), is attributable to dilatoriness on the part of public officials.

The fact that he was originally released on his own application is no more significant here than it was in *Harris v. Lang*, 27 App. D. C. 84, discussed in footnote fashion at Br. Op. 9-10, note 7. After all, writs of habeas corpus issue only on application. And, when petitioner was discharged by the court in the Eastern District of Pennsylvania *no bail was required then or when the Government filed a notice of appeal.* The statement to the contrary by the Nevada court (R. 14, note 2; 188 F. Supp. at 907, note 2) and adopted by the Government (Br. Op. 2) is in error.

If the present petition is granted and the case is set for argument, petitioner will show that, as a matter of law, he has served all his time.

But petitioner can be granted his liberty without any need for a plenary hearing. And unless there is present here some compelling reason why the United States must, in violation of expressed Congressional policy, exact its ounce of flesh; unless some overriding social interest requires that this individual must be pursued with the im-

placable vindictiveness with which Inspector Javert hounded Jean Valjean in *Les Miserables;* then it is submitted that, following *Powell v. Wiman*, 287 F. 2d 275, 282 (C. A. 5, 1961) and *Aderhold v. O'Neill*, 66 F. 2d 85 (C. A. 5, 1933), and under the "law and justice" formula of 28 U. S. C. § 2243, petitioner's discharge now would best serve the ends of justice.

Respectfully submitted,

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